Petition

No. 81-1233

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY GIACOMINO, JOHN KNIGHT and FRANK PETULLO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the double jeopardy clause of the Fifth Amendment to the Constitution of the United States bar the retrial of Petitioners after their first trial resulted in the declaration of a mistrial on Petitioner's motions predicated upon prosecutive misconduct in violation of the standards announced in *Brady* v. *Maryland*, 373 U.S. 83?

INDEX

	PAGE
Question Presented for Review	i
Opinions Below	1
Jurisdictional Statement	2
Constitutional Provisions Involved	2
Statement	2
Reasons for Granting the Writ	6
Conclusion	10

INDEX TO APPENDIX

Memorandum Opinion of the United States District Court, Northern District of Illinois, Eastern Division	A-1
Order of the United States Court of Appeals, for the Seventh Circuit dated July 24, 1981	A-14
Order of the United States Court of Appeals denying Rehearing	A-19

INDEX TO AUTHORITIES CITED

Constitutional Provisions & Statutes

	PAGE
Title 18 U. S. C., § 286	2
Title 18 U. S. C., § 1001	3
Title 18 U. S. C., § 1254(1)	2
Title 18 U. S. C., § 2315	3
Due Process Clause of the Fifth Amendment	2, 8, 9
Double Jeopardy Clause of the Fifth Amendment	1, 2, 6, 7, 9

Cases

Benton v. *Maryland,* 395 U. S. 784	9
Brady v. *Maryland,* 373 U. S. 83	i, 5
Downum v. *United States,* 372 U. S. 734	8
Lee v. *United States,* 432 U. S. 23	8
Oregon v. *Kennedy,* 50 U. S. L. W. 3278, 30 Cr. L. Rep. 4029	6, 9
Palko v. *Connecticut,* 302 U. S. 319	9
United States v. *Dinitz,* 424 U. S. 600	7
United States v. *Jorn,* 400 U. S. 470, 485	7

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Now come Anthony Giacomino, John Knight and Frank Petullo, Petitioners and pray that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review its judgment affirming the order of the United States District Court for the Northern District of Illinois denying Petitioners' motions to dismiss the indictment in the instant case.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit affirmed the order of the District Court permitting retrial in an unpublished order dated July 24, 1981. That order is reproduced in the Appendix. The District Court for the Northern District of Illinois denied Petitioners' motions to dismiss the indictment on double jeopardy grounds in a memorandum opinion dated October 20, 1980. That opinion is also unpublished and is reproduced in the Appendix.

JURISDICTIONAL STATEMENT

Subsequent to the decision of the Court of Appeals for the Seventh Circuit on July 24, 1981, affirming the District Court's order, timely petition for rehearing with the suggestion of a rehearing *en banc* was denied on November 2, 1981. This Court's jurisdiction is predicated upon Title 28 U. S. C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

Petitioners, along with Robert Conn and John Christopher, were named as Defendants in a thirteen count indictment returned by the Grand Jury of the District Court. Count One charged a conspiracy to submit false claims in violation of 18 U. S. C. § 286 in a matter within the jurisdiction of the Federal Disaster Assistance Administration. It was alleged in that count that Petitioners conspired to obtain payment of a false and fraudulent claim for snow removal work supposedly performed for the City of Chicago during the blizzard conditions obtaining in that City during January and February of 1979. The blizzard resulted in federal financial assistance to help defray the costs

of snow removal. In sum, it was alleged that Conn, with the assistance of Petullo, submitted false vouchers to the City for payment in the name of a fictitious McCann Construction Company. A check in the amount of $111,912.00 was forwarded by mail to the Wisconsin address given by Conn for the McCann Construction Company. It was further alleged that Conn sought and received the assistance of Petitioners Petullo, Giacomino and Knight in cashing the check and finally, that the Defendant Christopher attempted to realize the proceeds through an Illinois bank. Counts Two through Eleven were substantive false statement counts drawn under 18 U. S. C. § 1001 against the Defendants Conn and Petullo. Count Twelve was a false statement count against the Defendant Christopher and Count Thirteen named Petitioners Giacomino and Knight and charged them with knowingly receiving the fraudulently obtained check in interstate commerce in violation of 18 U. S. C. § 2315.

The Defendant Conn entered a plea of guilty and was the major witness for the Government. The cross-examination of Conn was intense and his credibility was directly challenged. The major issue at the trial was whether Conn's testimony could be believed. If if were, the guilt of Defendants was largely established. Beginning in March of 1979 and continuing to the commencement of the trial in May of 1980, Conn had given numerous contradictory versions of the events in question to various law enforcement agencies. The final version contained in his direct trial testimony involved in a critical manner an individual from Wisconsin named Michael Hageny.

In his testimony, Conn stated that he was provided with blank forms by Petitioner Petullo which he filled out falsely indicating snow removal work performed for the City. Petullo, according to Conn, filed the forms to support Conn's false vouchers which he then filed in the name of McCann Construction Company. Conn utilized an address in Wisconsin which was the home of Fred and Michael Hageny. He stated that he received a phone call from Petullo advising him that the check

in payment of the voucher had been mailed. On March 6, 1979, again according to Conn's testimony, he went to the Hageny home, intercepted the mail at the mailbox, and took the check. He then stated that he entered the Hageny home, stayed overnight with Michael Hageny and came to Chicago in Hageny's company on March 7, 1979, with the check. In Chicago, he and Hageny met with Petitioners Knight and Petullo and the four drove to the home of Petitioner Giacomino in Oak Park. Conn stated that he told Hageny to go into another room and watch television while he, Petullo, Knight and Giacomino discussed the check. Conn left the check at the Giacomino home and he and Hageny returned to a hotel in Skokie where they stayed overnight and returned to Wisconsin the following day. According to the Government's evidence, the check was eventually deposited in an Illinois bank account opened by the Defendant John Christopher in the name of McCann Construction Company. Christopher's attempts to realize the proceeds were eventually unsuccessful.

Michael Hageny appeared on July 25, 1979 at the United States Attorney's office in Chicago pursuant to a grand jury subpoena which had been served upon him. He gave a statement at that time to one of the trial prosecutors and the agent of the FBI in charge of the investigation. On the same day he testified before the Grand Jury. As early as March 15, 1979, one week following the incident, Hageny was interviewed by Chicago Police officers. Hageny denied consistently that Conn had come to his home in March 1979. He did not recall making a trip to Chicago with Conn nor meeting with any of the Petitioners.

At some point after his Grand Jury appearance, Hageny met with the prosecutor, the FBI agent, and Conn in a hotel room in Kenosha, Wisconsin. Again, Michael Hageny refused to corroborate Conn's version of events. He was again subpoenaed to appear before the Grand Jury. At the United States Attorney's office in Chicago, he was once again questioned by the prosecutor, once again refusing to support Conn's testi-

mony. He did not appear before the Grand Jury. Again in January 1980, Hageny came to the United States Attorney's office in response to a subpoena. He was again interviewed with the same result. On March 17, 1980, Hageny was once more subpoenaed and he once more appeared at the United States Attorney's office. He was interviewed on this occasion by both trial prosecutors and, again, he failed to support Conn's statements. On March 20 or 21, 1980, he received a telephone call from the chief prosecutor with the same result. Finally, on June 2, 1980, during the course of the trial, Hageny was interviewed by the prosecutors and he steadfastly refused to support Conn's story.

In the course of his repeated contacts with the prosecutors and the agents, Conn was subjected to considerable pressure. He was called a liar on several occasions and threatened with prosecution for perjury as a result of his July 1979 Grand Jury testimony. Indeed, a perjury investigation was opened in the United States Attorney's office. In fact, Hagney stated the FBI agent advised him to tell his wife that he would be gone for three or four years for perjury. On June 3, 1980 after Conn had testified, been cross examined, recalled, and cross-examined again, the prosecutors disclosed to counsel and the Court, for the first time, the statements they had taken from Hageny and a transcript of his Grand Jury testimony. Motions were filed to dismiss the indictment for the failure to disclose evidence favorable to the defendants in a timely and proper fashion. Motions for mistrial were also advanced and the trial Judge held a hearing at which Hageny testified. On June 4, 1980, the trial Judge granted the motions for mistrial holding that serious violations of the principle of *Brady* v. *Maryland,* 373 U. S. 83, were presented and that a continuance would be insufficient to remedy the resulting prejudice to the defendants' case:

> "In this Court's opinion at this stage of the proceedings it is questionable whether the Government will have finally, if allowed to, carry its burden of any or all of the defendants. Therefore the evidence regarding Michael Hageny's role, if

> fully developed, might be sufficient to create a reasonable doubt about any or all of the defendants' guilt. . . ." Trial Transcript, 1392.

Following the mistrial additional motions to dismiss the indictment on double jeopardy grounds were presented, briefed and argued. On October 20, 1980 the trial Court denial those motions. Appeal to the United States Court of Appeals followed resulted in the order affirming the trial court's determination which we now ask this Court to review.

REASONS FOR GRANTING THE WRIT

On October 13, 1981, this Court granted the Petition for Certiorari in No. 80-1991, *Oregon* v. *Kennedy,* 50 U.S.L.W. 3278, 30 Cr. L. Rep. 4029. That case presents the question whether the Double Jeopardy Clause of the Fifth Amendment bars retrial of a defendant after mistrial granted by the trial court on defendant's own motion. In that case as this, the task at hand involves determining whether or not "prosecutive overreaching" was involved to the extent necessary to trigger the application of the Double Jeopardy Clause even when the case was originally mistried on defendant's own motion. We suggest that this Court's resolution of the *Kennedy* case should have a considerable bearing upon the proper dispostition of this one.[1]

The previous decisions of this Court have made it clear that ordinarily there is no jeopardy bar to retrial after mistrial on a defendant's own motion. Certainly that is true when the motion is predicated upon nothing more than the kind of error commonly the basis for reversal of convictions on appeal. In

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[1] In the District Court, Petitioner Petullo suggested the dismissal of the indictment based upon the supervisory power. That Court, A-12 footnote 20, took the view that the exercise of supervisory power was limited to courts of appellate jurisdiction. The Court of Appeals did not address the issue. This court, however, may wish to review the question whether the activities of prosecutive personnel were such as to require reversal on that ground alone.

those instances, though the error be glaring and, by definition, prejudicial, it is nonetheless insufficient to deprive the prosecutive authority of its right to a "fair trial and just judgment." The defendant's complementary right to a determination by the trier of fact he has selected does not survive his own determination to forego that right in favor of a fairer trial in another tribunal.

The opinions of this Court, however, recognize a constitutionally mandated exception in instances in which a defendant's motion is necessitated by conduct amounting to prosecutive or judicial overreaching. Obviously, it would not do to permit a prosecutor about to lose his case to engage deliberately in conduct so egregious as to provoke a mistrial and then to permit him another chance at victory. The question this case presents concerns the precise delineation of that exception. Does it extend, for instance, to the misconduct of a prosecutor intent not upon provoking a mistrial, but upon obtaining unfair advantage of a defendant and thereby securing his conviction knowing that if his conduct is exposed he will be faced, at worst, with the prospect of a new trial?

The narrow constitutional issue may be sharpened by a consideration of some of the language this court has used in its double jeopardy decisions. In *United States* v. *Jorn*, 400 U. S. 470, 485, the plurality stated the general rule:

> "Where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any bar to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error."

In *United States* v. *Dinitz*, 424 U. S. 600, the court phrased the exception:

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars

> retrials where "bad-faith conduct by judge or prosecutor," . . . threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. 424 U. S. 600, 611. And see, *Downum* v. *United States,* 372 U. S. 734.

In *Lee* v. *United States,* 432 U. S. 23, the exception was phrased to include error "intended to provoke" a mistrial motion or "*otherwise,* 'motivated by bad faith *or* undertaken to harass or prejudice.' " 432 U. S. 23, 33-34 [emphasis added].

We believe that this case falls amply within the standards to be distilled from the jeopardy decisions of this Court. We think that standard is, and ought to be, broad enough to encompass prosecutive misconduct which, even if not explicitly dedicated to obtaining a mistrial, postulates that possibility as the alternative to obtaining an unfair conviction. In this case, the record reveals the deliberate suppression of the Hageny evidence in all its manifestations. The repeated attempts by prosecutors to bring to bear upon Hageny such pressure as they hoped would be sufficient to alter his account of events so that that account would comport with Conn's, reveal the dominant purpose underlying the conduct in question; they explain why Hageny's very existence as a potential witness in this case, not to speak of his Grand Jury appearance and his many statements, were hidden from defense counsel. Only after Conn had left the stand and the prosecutors last ditch attempt to force Hageny to recant had failed, did the prosecutors remember their eight previous contracts with him and appreciate the importance of his testimony to the defense. When the sovereign, by such activities of its agents, deliberately forecloses the possibility of a fair trial and a just judgment, we respectfully submit that the Double Jeopardy Clause operates to bar retrial and end the litigation once and for all.

This conclusion may be buttressed by a consideration of the due process aspects of the instant situation. Certainly, it

cannot be the constitutional purpose to encourage prosecutive misconduct. But that is the result of simply permitting a prosecutor to begin again after he has been discovered with his fingers, so to speak, in the cookie jar. The interrelationship between due process and double jeopardy may be roughly sketched by a comparison of the dissenting opinion of Mr. Justice Harlan in *Benton* v. *Maryland,* 395 U. S. 784, with *Palko* v. *Connecticut,* 302 U. S. 319. In *Benton,* Mr. Justice Harlan, after dissenting from the majority's overruling of *Palko,* went on to consider the case before the Court on due process grounds and held, at 395 U. S. 810-813, that retrial on one of the charges there denied due process. That case, as this, may be distinguished from *Palko* where retrial occurred after an appeal by the State resulting in the correction of error by which the trial judge had afforded the defendant undue advantage. If in *Benton:*

> "The State had no more interest in compelling petitioner to stand trial again for larceny, of which he had been acquitted, than in retrying any other person declared innocent after an error-free trial." 395 U. S. 784, 813 [Harlan, J. dissenting].

then here the Government has forfeited the interest it may have had in compelling Petitioners to stand trial again by its own misconduct.

It is to clarify the relationship between the Due Process and Double Jeopardy Clauses of the Fifth Amendment as well as to delineate the proper operation of the Double Jeopardy Clause itself in conjunction with this Court's consideration of *Oregon* v. *Kennedy,* No. 80-1991, that we ask this Court to issue its writ of certiorari in the captioned case.

CONCLUSION

For the reasons discussed above, we respectfully submit that this Court ought to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review that Court's judgment in the instant case.

Respectfully submitted,

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December, 1981.

Appendix

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA v. ROBERT CONN, JOHN CHRISTOPHER, ANTHONY GIACOMINO, JOHN KNIGHT, and FRANK PETULLO,	79 CR 610

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This matter comes before the court on the motions of defendants Christopher, Giacomino, Knight and Petullo to dismiss the indictment on the ground that further prosecution is barred by the double jeopardy clause of the fifth amendment[1] to the United States Constitution.[2] For the reasons set forth below, the motions are denied.

Count I of the indictment alleges that defendants Conn, Christopher, Giacomino, Knight and Petullo conspired to defraud the Federal Disaster Assistance Administration, Department of Housing and Urban Development (the "FDAA"), by obtaining and aiding to obtain the payment and allowance of false, fictitious and fraudulent claims for snow removal work supposedly done for the City of Chicago between January 16, 1979 and January 25, 1979, in violation of 18 U.S.C. § 286.[3]

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[1] The double jeopardy clause of the fifth amendment to the United States Constitution states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

[2] Defendant Petullo also moved to dismiss the indictment on the ground that the court under its supervisory powers, citing 28 U. S. C. § 2106, should not allow a retrial because defendant Petullo was deprived of his fifth and sixth amendment rights.

[3] 18 U. S. C. § 286 states:

> Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department

(footnote continued on following page)

Counts two through eleven of the indictment allege that, in a matter within the jurisdiction of the FDAA, defendants Conn[4] and Petullo submitted and caused to be submitted false, fictitious, and fraudulent claims for snow removal work to the City of Chicago Department of Streets and Sanitation—Bureau of Sanitation, in violation of 18 U.S.C. § 1001.[5] Count twelve of the indictment alleges that, in a matter within the jurisdiction of the FDAA, defendant Christopher, by endorsing City of Chicago check number 015826, dated February 28, 1979 payable to McCann Construction in the amount of $111,912.00 (the "check"), represented that he was entitled to the use and benefit of the proceeds of the check when he was not so entitled, in violation of 18 U.S.C. § 1001. Count thirteen of the indictment alleges that defendants Giacomino and Knight received and disposed of the check knowing that it had been unlawfully converted and taken, in violation of 18 U.S.C. § 2315.[6]

(footnote continued from previous page)

> or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

[4] On January 11, 1980 defendant Conn plead guilty on counts 1 and 2 of the indictment.

[5] 18 U. S. C. § 1001 states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[6] 18 U. S. C. § 2315 states in pertinent part:

(footnote continued on following page)

The trial began on May 21, 1980. After the Government's principal witness, defendant Conn, testified, the Government turned over to all defense counsel evidence regarding Michael Hageny which did not corroborate parts of defendant Conn's testimony. Defendants Christopher, Giacomino, Knight and Petullo moved either to dismiss the indictment or for a mistrial. On June 4, 1980, the court granted the motions of defendants Christopher, Giacomino, Knight and Petullo for a mistrial on the ground that the evidence regarding Michael Hageny constituted *Brady*[7] material.[8] After a new trial date was set by the court, defendants Christopher, Giacomino, Knight and Petullo moved to dismiss the indictment on the ground that reprosecution violates the double jeopardy clause of the fifth amendment to the United States Constitution.[9]

The evidence regarding Michael Hageny is significant. In a sworn statement dated December 27, 1979 defendant Conn stated, *inter alia,* that in January 1979 he was working with Don Hageny[10] for the City of Chicago as a contractor removing snow from the city streets; that he was advised by someone

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(footnote continued from previous page)

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more . . . moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken . . .
>
> * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

[7] Brady v. Maryland, 373 U. S. 83 (1963).

[8] This ruling was without prejudice to the renewal of defendants' motions for dismissal of the indictment if they deemed it appropriate.

[9] As noted above, defendant Petullo also moved to dismiss the indictment on the ground that retrial is barred under the court's supervisory powers, citing 28 U. S. C. § 2106.

[10] Don Hageny is Michael Hageny's uncle.

named Frank[11] in City Hall how to receive payment for removing snow without actually doing so; that he followed Frank's instructions using the name McCann Construction and the address of Fred Hageny[12] in West Bend, Wisconsin; that after Frank advised him the check was coming in the mail he waited down the street from Fred Hageny's mailbox, took the check from the mailbox after the mail was delivered, took the rest of the mail into Fred Hageny's home and spent the entire evening at Fred Hageny's home; that the next day he returned to Chicago with the check and met Frank and someone named John; that John told him he could get the check cashed without an endorsement; that he, Frank and John went to the house of someone named Tony[13] and the check was given to Tony; that upon his return to Wisconsin several days later, he learned Chicago police had been in Wisconsin inquiring about McCann Construction and snow removal work done in Chicago; and that a day or two later he received a telephone call from an unidentified person instructing him to "shut up or your family won't be there when you get home." At trial defendant Conn testified about these aspects of his statement and added, *inter alia,* that Michael Hageny had come with him when he returned to Chicago with the check; that Michael Hageny had accompanied him to defendant Giacomino's house; and that Michael Hageny had watched television while defendants Conn, Petullo, Knight and Giacomino discussed cashing the check. Thus, other than three of the defendants, only Michael Hageny could corroborate that part of defendant Conn's testimony regarding his trip to Chicago.

After defendant Conn testified the Government turned over to all defense counsel copies of a transcript of Michael Hageny's testimony on July 25, 1979 before the grand jury

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[11] In his sworn statement defendant Conn stated that he has identified defendant Petullo as the Frank in City Hall.

[12] Fred Hageny is Michael Hageny's father.

[13] In his sworn statement defendant Conn stated that while he was at Tony's house he picked up one of defendant Giacomino's business cards from the table.

conducting an investigation into the submission of fraudulent snow removal bills to the City of Chicago by McCann Construction Company and copies of a Federal Bureau of Investigation (the "FBI") form number FD-302 dated July 30, 1979 (the "302"). Before the grand jury Michael Hageny testified that defendant Conn did not come to, and did not stay overnight in, Fred Hageny's home in West Bend, Wisconsin after the snow removal work was finished (from the time the snow removal work was finished until the time his parents moved out of their home in West Bend, Wisconsin, Michael Hageny and his family lived with his parents in West Bend, Wisconsin); that the next time he saw defendant Conn after finishing the snow removal work was in the summer; and that when the Chicago police asked him about the check, they mentioned "Trunksville," that is, someone involved with the check could be found in a trunk. In the FBI 302 it is stated that Michael Hageny advised that during the first of March 1979 he noticed a lone male, a police officer from West Bend, Wisconsin, sitting in front of Fred Hageny's home on numerous occasions and that he seriously doubts anyone could have tampered with the mail without his knowledge. Thus, Michael Hageny's statements to the grand jury and to the FBI do not corroborate defendant Conn's testimony regarding obtaining the check from Fred Hageny's mailbox and staying overnight at Fred Hageny's home.

Realizing the impeachment nature of the evidence regarding Michael Hageny, defendants Christopher, Giacomino, Knight and Petullo moved either to dismiss the indictment or for a mistrial. These defendants also asked the court to conduct a hearing and receive testimony from Michael Hageny and the court agreed to do so. In that hearing Michael Hageny testified that he did not remember coming to Chicago with defendant Conn in March 1979; that defendant Conn did not stay overnight in, and he does not remember defendant Conn coming to, Fred Hageny's home in West Bend, Wisconsin; that the Chicago Police officers said to him "If you mess with these guys, you will end up in Trunksville or in a trunk"; that he told the FBI above a police officer from West Bend, Wisconsin

sitting in a car out in front of Fred Hageny's home two or three times; and that he knew a threat had been made against defendant Conn.

The evidence regarding Michael Hageny did not corroborate defendant Conn's testimony in material part and indicated it might have led to the discovery of other evidence if the defense had known about it. Therefore, the court concluded that the evidence regarding Michael Hageny constituted *Brady* material and granted the motions of defendants Christopher, Giacomino, Knight and Petullo for a mistrial.

The question now is whether the double jeopardy clause prohibits reprosecution.

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. *Green v. United States,* 355 U.S. 184, 187-88 (1957).

These considerations led the Supreme Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge. *Id.* at 188; *Wade v. Hunter,* 336 U.S. 684, 688 (1949). However, the double jeopardy clause

> does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible. . . . In such event the purpose of law to protect

> society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments. *Wade v. Hunter,* 336 U.S. 684, 688-89 (1949).[14]

In *United States v. Tateo,* 337 U.S. 463, 466 (1964), the Supreme Court elaborated on society's interest in reprosecuting a defendant whose first trial ended in a mistrial:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendant's rights as well as society's interest.

The conclusion that "jeopardy attaches" when the trial commences expresses a judgment that the constitutional policies underpinning the fifth amendment's guarantee are implicated at that point in the proceedings. *United States v. Jorn,* 400 U.S. 470, 480 (1971). However, in cases in which a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the double jeopardy clause bars retrial. *Illinois v. Somerville,* 410 U.S. 458, 467 (1973).

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[14] Thus, a defendant's "valued right to have his trial completed by a particular tribunal" is sometimes subordinate to a larger interest in having the trial end in a just judgment. *Arizona v. Washington,* 434 U. S. 497, 503 n. 11 (1978).

In the plurality opinion in *United States v. Jorn*, four justices of the Supreme Court considered in what circumstances retrial is to be precluded when the initial proceedings are aborted prior to verdict without the defendant's consent. In so doing the plurality stated:

> where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. 400 U.S. at 485.

In *United States v. Dinitz*, 424 U.S. 600 (1976), the Supreme Court considered whether the double jeopardy clause was violated by retrial of a defendant after his original trial ended in a mistrial granted at his request. There the Court stated:

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor," . . . threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. *Id.* at 611.

The Supreme Court reemphasized this in *Lee v. United States*, 432 U.S. 23, 33-34 (1977), when it stated that there is no double jeopardy barrier to a defendant's retrial unless the judicial or prosecutorial error that prompted [defendant's] motion was "intended to provoke" the motion or was otherwise "motivated by bad faith or undertaken to harass or prejudice" [defendant].[15]

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[15] In *Devans* v. *California*, 434 U. S. 1303 (1977), Justice Rehnquist, as Circuit Justice, stated:

> Any order granting a mistrial at the behest of a defendant in a criminal case is typically based upon error or mis-

(footnote continued on following page)

Thus, the question before the court is whether the Government's untimely disclosure of the *Brady* material constituted prosecutorial overreaching.[16]

Defendants Christopher, Giacomino, Knight and Petullo contend the court should adopt the approach set forth in *United States v. Kessler,* 530 F.2d 1246, 1256 (5th Cir. 1976):

> To find "prosecutorial overreaching," the Government must have, through "gross negligence or intentional misconduct," caused aggravated circumstances to develop which "seriously prejudice[d] a defendant" causing him to "reasonably conclude that a continuation of the tainted proceeding would result in a conviction." (footnote omitted)

The court cannot agree. Firstly, neither the Supreme Court nor the Seventh Circuit has held that a showing of gross negligence[17] constitutes overreaching sufficient to invoke the bar of double jeopardy. *United States v. Medina-Herrera,* 606 F.2d 770, 776 n.6 (7th Cir. 1979), *cert. denied,* 100 S.Ct. 2939 (1980); *United States v. Crouch,* 566 F.2d 1311, 1318 n.9 (5th Cir. 1978); *United States v. Wilson,* 534 F.2d 76, 80 n.6 (6th Cir. 1976). Secondly, the test is not whether the Government caused aggravated circumstances to develop which seriously prejudiced defendants, *United States v. Kessler,* 530 F.2d at 1256, but whether the error was intended to provoke a motion

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(footnote continued from previous page)

> conduct on the part of other counsel or the court. In order to elevate such a typical order into one which could form the basis of a claim of double jeopardy, it must be shown not only that there was error, which is the common predicate to all such orders, but that such error was committed by the prosecution or by the court for the purpose of forcing the defendant to move for a mistrial.

[16] In *Arizona* v. *Washington,* 434 U. S. at 511 n.29, the Supreme Court expressed "no opinion regarding whether the failure of the prosecutor to hand over *Brady* . . . material to the defense at the first trial was deliberate or inadvertent."

[17] Mere negligence on the part of the Government is not enough. *Lee* v. *United States,* 432 U. S. at 34.

for mistrial so as to afford the Government a more favorable opportunity to convict defendants or whether the error was motivated by bad faith undertaken to harass or prejudice defendants by successive prosecutions. *Lee v. United States,* 432 U.S. at 33-34; *United States v. Dinitz,* 424 U.S. at 611.

In order to determine whether the error was intended to provoke a motion for mistrial or was otherwise motivated by bad faith or undertaken to harass or prejudice defendants, it is necessary to go beyond the trial record and to inquire into the circumstances surrounding the declaration of the mistrial. *United States v. Wilson,* 534 F.2d at 82; *United States v. Kessler,* 530 F.2d at 1256. Thus, the court asked the two prosecutors and the FBI agent assigned to the case to submit affidavits regarding the Michael Hageny evidence.[18] In ruling on the motions to dismiss the indictment, the court has considered, *inter alia,* the evidence introduced and the testimony elicited during the trial, the *Brady* evidence, the arguments made by the parties during the hearing on the motions for a mistrial, the testimony of Michael Hageny, the arguments made by the parties in the memoranda in support of and in opposition to the motions to dismiss the indictment, and the affidavits of the prosecutors and the FBI agent.

The *Brady* material consists of two categories of evidence: (1) the documents (Michael Hageny's grand jury testimony and the FBI 302); and (2) the identity of Michael Hageny as a witness who might be favorable to the defense. The Govern-

[18] Defendants Christopher, Giacomino, Knight and Petullo asked the court for an evidentiary hearing on the issue of prosecutional overreaching. Before ruling on their motions, the court, with the agreement of counsel for defendants Christopher, Giacomino, Knight and Petullo, asked for submission of the affidavits. After receipt of the affidavits by defense counsel and the court, the court asked defense counsel to submit anything further on the issue of an evidentiary hearing with..1 seven days. Since defense counsel did not submit anything further, the court does not deem it necessary to conduct an evidentiary hearing.

ment's explanation of its conduct differs with regard to the type of evidence involved.[19]

With respect to the documents, the Government represents that it discovered these materials the night before they were turned over to defense counsel. Given the sequence of events, the court is unable to conclude that the Government did not turn over these documents because it intended to provoke a motion for a mistrial or because the nondisclosure was motivated by bad faith or undertaken to harass or prejudice defendants. The FBI 302 records an interview with Michael Hageny on July 25, 1979 and Michael Hageny appeared before the grand jury on July 25, 1979. The interview and the examination of Michael Hageny occurred before the Government knew that: (1) defendant Conn was going to state in his sworn statement that he took the check from Fred Hageny's mailbox and stayed overnight at Fred Hageny's home; and (2) defendant Conn was going to testify that Michael Hageny accompanied him on the trip to Chicago. Approximately six months later defendant Conn plead guilty and made his sworn statement. Sometime thereafter the Government became aware of the alleged involvement of Michael Hageny in the trip to Chicago. Thus, at the time Michael Hageny made any of the statements contained within the documents, they did not, and could not, appear to contradict statements of defendant Conn. Had the Government reviewed these documents earlier than it states it did, its *Brady* character would have been, as it later was, obvious. However, this court cannot conclude that the Government was aware of the *Brady* character of the documents prior to the time that it said it was.

With respect to the disclosure of Michael Hageny as a witness who might be favorable to the defense, the Government contends it did not disclose Michael Hageny's identity because it believed that Michael Hageny was refusing to tell the truth

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[19] It is significant to note that these were contemporaneous explanations and not after the fact rationalizations. *United States* v. *Crouch*, 566 F. 2d at 1319 n. 11.

due to fear and therefore that Michael Hageny ultimately would tell the truth. After defendant Conn stated that Michael Hageny had accompanied him on the trip to Chicago, the affidavits indicate, *inter alia*, that the Government contacted Michael Hageny and asked him whether he came to Chicago with defendant Conn; that Michael Hageny initially responded in one of several ways: he did not remember the trip, he may have made the trip but did not remember it, he was not sure if he had made the trip because he could not remember very well, he could have forgotten the trip, and sometimes he did not say anything at all; that Michael Hageny admitted to one of the prosecutors accompanying defendant Conn to Chicago and recalled going to a house with defendant Conn and meeting some people; that Michael Hageny did not want to testify because he was frightened; and that Michael Hageny never denied accompanying defendant Conn to Chicago. It is the Government's contention that it considered Michael Hageny a reluctant Government witness because of his fear and that it believed it could convice Michael Hageny to testify truthfully at trial. The Government's error was that it failed to recognize that Michael Hageny could persist in his position that he did not remember and that this persistence would make him a favorable witness for the defense. While the court cannot speak admiringly of the Government's pretrial preparation with respect to Michael Hageny, it is unable to conclude that the Government's nondisclosure of his identity was motivated by bad faith or undertaken to harass or prejudice defendants.

In sum, the court has determined that the Government's errors were neither the product of a scheme intentionally calculated to trigger the declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict nor motivated by bad faith or undertaken to harass or prejudice defendants by successive prosecutions.

Accordingly, the motions of defendants Christopher, Giacomino, Knight and Petullo to dismiss the indictment are denied.[20]

It is so ordered.

UNITED STATES DISTRICT JUDGE

DATED: October 20, 1980

[20] As noted above, defendant Petullo also moved to dismiss the indictment on the ground that the court under its supervisory powers, citing 28 U. S. C. § 2106, should not allow a retrial because defendant Petullo was deprived of his sixth amendment rights to confront witnesses and of effective assistance of counsel and his fifth amendment right to due process of law. The court does not agree. Firstly, 28 U. S. C. § 2106 by its express terms only applies to courts of appellate jurisdiction. Secondly, assuming *arguendo* that defendant Petullo was deprived of these fifth and sixth amendment rights, a motion by a defendant for mistrial not necessitated by prosecutorial or judicial overreaching removes any barrier to reprosecution. *E. g., United States* v. *Jorn,* 400 U. S. at 485.

United States Court of Appeals

Chicago, Illinois 60604
Argued May 11, 1981

July 24, 1981

Before
Hon. LUTHUR M. SWYGERT, Senior Circuit Judge*
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. EARL R. LARSON, Senior District Judge**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

Nos. 80-2610, 80-2611, 80-2612, 80-2613 ANTHONY GIACOMINO, JOHN KNIGHT, FRANK PETULLO and JOHN CHRISTOPHER,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 CR 610
Joel M. Flaum,
Judge.

ORDER

The issue before us is whether the double jeopardy clause of the Fifth Amendment bars reprosecution when the first trial ended in a mistrial due to the Government's failure to disclose the identity of a witness favorable to the defense and to furnish copies of his prior statements. Under the circumstances presented in this case, we hold that the trial court properly denied defendants' motion to dismiss the indictment on the ground of double jeopardy.

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* At the time of oral argument, Judge Swygert was a circuit judge in active service; he assumed senior status on July 1, 1981.

** The Honorable Earl R. Larson, United States Senior District Judge for the District of Minnesota, is sitting by designation.

On January 2, 1980, defendants Anthony Giacomino, John Knight, Robert Conn, Frank Petullo, and John Christopher were named in a thirteen-count indictment. Count One charged defendants with conspiracy to defraud the Federal Disaster Assistance Administration by obtaining and aiding to obtain payment of fraudulent claims for snow removal work allegedly completed in January 1979 for the City of Chicago, in violation of 18 U.S.C. § 286. Counts Two through Eleven alleged that defendants Conn and Petullo submitted fraudulent claims for snow removal work to the City of Chicago, in violation of 18 U.S.C. § 1001. Count Twelve charged that defendant Christopher violated 18 U.S.C. § 1001 by representing that he was entitled to the proceeds of a City of Chicago check in the amount of $111,912 made payable to the McCann Construction Company. Count Thirteen alleged that defendants Giacomino and Knight received and disposed of the check, knowing that it had been illegally converted, in violation of 18 U. S. C. § 2315.

Defendant Conn pleaded guilty to Counts One and Two of the indictment on January 11, 1980. The trial of the remaining defendants began on May 21, 1980. During the trial, Conn, the Government's principal witness, testified that in January 1979 he and Fred Hageny were doing snow removal work for the City of Chicago. Frank Petullo, who was employed at City Hall, told him how to receive payment for snow removal work that was never performed by filling out blank billing forms provided by Petullo. Conn completed the forms using the name of the "McCann Construction Company," a ficticious company, and giving Hageny's address in West Bend, Wisconsin. Conn submitted the last billing form on February 27, 1979, and then returned to his home in Crandon, Wisconsin.

According to Conn, Petullo told him approximately one week later that a check for the fraudulent claims was being put in the mail. Conn testified that on March 6, 1979, he drove to the Hageny residence and removed the check from the mailbox. He then entered the Hageny residence and spent the night there.

The following day he drove with Michael Hageny to Skokie, Illinois; there they met Petullo and Knight, and the four men drove to the home of Giacomino in Oak Park, Illinois. While Hageny waited in another room, the others discussed ways of cashing the check. Conn and Hageny stayed at a motel in Skokie on March 7 and spent the next two nights at a hotel near O'Hare Airport. Upon returning to Wisconsin, Conn received a threatening telephone call telling him to keep quiet.

Conn's testimony was presented at the trial from May 28 to June 2, 1980. On the morning of June 3, 1980, the Government disclosed to defense counsel that Michael Hageny was a potentially favorable witness and furnished counsel with a transcript of Hageny's testimony before the grand jury on July 25, 1979.

Michael Hageny's testimony before the grand jury contradicted substantial parts of Conn's testimony. According to Hageny, Conn had not come to the Hageny home after the snow removal work was completed. Further, he stated that he did not see Conn after the completion of their work in Chicago until the summer of 1979. In a statement to the FBI, Hageny indicated that he did not believe that anyone could have tampered with the mail without his knowledge.

After receiving the transcript of Michael Hageny's grand jury testimony, defense counsel moved for a mistrial; the district court held an evidentiary hearing on the motion. At that hearing, Hageny stated that he did not remember coming to Chicago with defendant Conn in March 1979, that Conn did not stay overnight in Fred Hageny's home in West Bend, and that he knew a threat had been made against Conn.

On June 4, 1980, the court granted defendants' motion for a mistrial on the ground that the Government's failure to disclose the identity of a witness favorable to the defense and to furnish the supporting documents violated the principle announced in *Brady* v. *Maryland,* 373 U.S. 83 (1963). Shortly thereafter, defendants moved to dismiss the indictment on the

ground that the double jeopardy clause of the Fifth Amendment barred a retrial of these defendants. On October 20, 1980, the trial court denied the motion, and this appeal followed.

The general rule regarding reprosecution after a mistrial is that "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitatied by prosecutorial or judicial error." *United States* v. *Dinitz,* 424 U.S. 600, 607 (1976) (quoting *United States v. Jorn,* 400 U.S. 470, 485 (1971) (plurality opinion)). Thus, the relevant inquiry in the instant case is whether the mistrial was declared as a result of prosecutorial overreaching.

The Supreme Court elaborated on the standard to be applied in determining whether prosecutorial or judicial overreaching has occured in *Lee v. United States,* 432 U.S. 23, 33-34 (1977), when it held that "there was no double jeopardy barrier to petitioner's retrial unless the judicial or prosecutorial error that prompted petitioner's motion was 'intended to provoke' the motion or was otherwise 'motivated by bad faith or undertaken to harass or prejudice' petitioner."[1] In the case at bar, the district court correctly applied this standard in holding that a retrial was not barred by the double jeopardy clause.

The court asked the two prosecutors and the FBI agent involved in the case to submit affidavits regarding the Hageny testimony. With respect to the documents (the grand jury transcript and the FBI form), the prosecutors stated that those papers were not discovered until the night before they were furnished to defense counsel. Hageny's grand jury testimony and statement to the FBI occurred before the Government knew that Conn was going to say in his sworn statement that he took the check from Fred Hageny's mailbox and spent the night

[1] The Supreme Court made it clear in *Lee, supra,* that mere negligence by the prosecutor does not constitute overreaching. 432 U. S. at 34.

at the Hageny home, and that he was going to testify at trial that Michael Hageny accompanied him to Chicago. As the district court noted, had the Government reviewed these documents earlier, it would have recognized their *Brady* character. Nevertheless, we agree with the district court's conclusion that the Government's failure to turn over the documents was not intended to provoke a motion for mistrial or motivated by bad faith or a desire to harass or prejudice defendants.

Regarding the failure to disclose the identity of Michael Hageny as a potentially favorable witness, the prosecutors stated that they believed that he refused to tell the truth out of fear, and that he ultimately would tell the truth. According to the prosecutors, Hageny responded differently at different times when asked about the alleged trip to Chicago with Conn; he even stated at one point that he was afraid to testify. The prosecutors apparently believed that they could convince Hageny to testify truthfully at trial. Although we believe that the Government should have disclosed Hageny's identity to defendants as soon as it knew of his potentially favorable testimony, we find that the record supports the district court's conclusion that the actions of the prosecutors were not intended to provoke a mistrial or motivated by bad faith.

For the foregoing reasons, the judgment of the district court is affirmed.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 2, 1981

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. EARL R. LAWSON, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

Nos. 80-2610, 80-2611
and 80-2613
ANTHONY GIACOMINO, JOHN KNIGHT,
and FRANK PETULLO, et al.,
Defendants-Appellants.

On Petition for Rehearing.

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Earl R. Larson, United States Senior District Judge for the District of Minnesota, sitting by designation.

Opposition

Supreme Court, U.S.
FILED
MAR 30 1982
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No. 81-1233

In the Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY GIACOMINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars reprosecution following a mistrial declared at the request of the defense and based upon prosecutorial conduct not intended to provoke a motion for a mistrial or motivated by bad faith or a desire to harass or prejudice the defendants.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Arizona v. *Washington*, 434 U.S. 497 5

Baker v. *Metcalfe*, 633 F. 2d 1198, cert. denied, 451 U.S. 974 7

Brady v. *Maryland*, 373 U.S. 83 ..... 3, 6

Lee v. *United States*, 432 U.S. 23 5

Mitchell v. *Smith*, 633 F. 2d 1009, cert. denied, 449 U.S. 1088 6

Oregon v. *Kennedy*, cert. granted, No. 80-1991 (Oct. 13, 1981) 7, 8

State v. *Kennedy*, 49 Or. App. 415, 691 P.2d 948 8

United States v. *Agurs*, 427 U.S. 97 6

United States v. *Crouch*, 566 F. 2d 1311 7

United States v. *Davis*, 589 F. 2d 904, cert. denied, 441 U.S. 950 7

United States v. *DiFrancesco*, 449 U.S. 117 5

United States v. *Dinitz*, 424 U.S. 600 5

Page

Cases—Continued:

United States v. *Enoch*, 650 F. 2d 115 7

United States v. *Green*, 636 F. 2d 925, cert. denied, 451 U.S. 929 6

United States v. *Kessler*, 530 F. 2d 1246 7

United States v. *Leppo*, 641 F. 2d 149 6

United States v. *Martin*, 561 F. 2d 135 7

United States v. *Opager*, 616 F. 2d 231 7

United States v. *Rios*, 637 F. 2d 728, cert. denied, 452 U.S. 918 6

United States v. *Roberts*, 640 F. 2d 225, cert. denied, No. 80-6557 (June 15, 1981) 6

United States v. *Scott*, 437 U.S. 82 5

United States v. *Zozlio*, 617 F. 2d 314 7

Constitution and statutes:

United States Constitution, Fifth Amendment (Double Jeopardy Clause) 4, 5

18 U.S.C. 371 2

18 U.S.C. 1001 2

18 U.S.C. 2315 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1233

ANTHONY GIACOMINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A-14 to A-18) and the opinion of the district court (Pet. App. A-1 to A-13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1981. A petition for rehearing was denied on November 2, 1981. The petition for a writ of certiorari was filed on January 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 2, 1980, petitioners, along with co-defendants John Christopher and Robert Conn, were indicted in the United States District Court for the Northern District of Illinois on one count of conspiracy to defraud the Federal Disaster Assistance Administration by

obtaining payment for fraudulent claims for snow removal, in violation of 18 U.S.C. 371. Conn and petitioner Petullo were also charged on 10 counts of submitting false claims for snow removal work, in violation of 18 U.S.C. 1001.[1] Petitioners Knight and Giacomino were charged with one count of receiving a check in the amount of $111,912, knowing that it had been illegally converted, in violation of 18 U.S.C. 2315. Conn pleaded guilty to the conspiracy and to one substantive count prior to trial. He later testified at petitioners' trial, which began on May 21, 1980. On June 4, 1980, the district court declared a mistrial because the government had not disclosed evidence contradicting Conn's testimony until after his direct examination had concluded. Petitioners then moved to dismiss the indictment on double jeopardy grounds. However, the district court denied that motion (Pet. App. A-1 to A-13), and the court of appeals affirmed (Pet. App. A-14 to A-18). As a result of petitioners' motion to dismiss the indictment, found by both lower federal courts to be without merit, petitioners' retrial has been delayed for more than one year.

2. At petitioners' first trial, Conn testified as follows: In January 1979, he and Fred Hageny performed snow removal work for the City of Chicago. At that time, petitioner Petullo, who worked at City Hall, suggested to Conn that he could be paid for snow removal that was not performed simply by filling out certain forms that Petullo would provide (Pet. App. A-3 to A-4, A-15). Conn followed Petullo's suggestion and completed the forms, using a fictitious company named "McCann Construction Company" and purportedly headquartered at Hageny's home address in West Bend, Wisconsin (*id.* at A-15). Conn submitted the last billing form on February 27, 1979. About a week later,

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[1] In addition, Christopher was charged with falsely representing that he was entitled to the proceeds of a City of Chicago check in the amount of $111,912, in violation of 18 U.S.C. 1001.

Petullo advised Conn that a check for the false claims was about to be placed in the mail (*ibid.*).

On March 6, Conn drove to the Hageny residence, removed the check from the mailbox, and spent the night in the house. The next day, he and Michael Hageny (Fred Hageny's son) drove to Skokie, Illinois, where they met petitioners Petullo and Knight (Pet. App. A-15 to A-16). The four then proceeded to petitioner Giacomino's home. While Michael Hageny waited in another room, Conn and the other three men discussed how to cash the check (*id.* at A-16). Conn and Michael Hageny spent the ensuing three nights in motels or hotels in the Chicago area. Shortly after he returned home, Conn received a telephone call threatening injury to his family if he did not keep quiet (*id.* at A-4, A-16).

Conn completed his testimony on June 2, 1980. The next morning, the prosecutors advised petitioners' counsel that Michael Hageny was a potentially favorable defense witness. The prosecutors also provided defense counsel with Hageny's July 1979 grand jury testimony, including Conn's statement that he removed the check from the Hageny mailbox and that he spent the night of March 6 at the Hageny residence (*id.* at A-4 to A-5, A-16).

Defense counsel then moved for a mistrial. An evidentiary hearing was held, and Michael Hageny testified that he did not remember coming to Chicago with Conn in March 1979 and that Conn did not stay overnight at the Hageny home (*id.* at A-5 to A-6, A-16). The district court granted petitioners' motion for a mistrial, holding that the government had violated the requirements of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by not disclosing at an earlier point that Michael Hageny was a potential defense witness and by not previously furnishing his prior statements contradicting Conn's testimony (Pet. App. A-6, A-16).

3. After their mistrial motion was granted, petitioners moved to dismiss the indictment on the ground that the Double Jeopardy Clause barred their retrial. The district court requested affidavits from the prosecutors and the FBI case agent concerning Hageny's testimony. In their affidavits, the prosecutors explained that they did not reveal that Hageny was a potential defense witness because they believed he would ultimately testify for the government and corroborate Conn's testimony. They explained that Hageny had given them contradictory answers concerning the March 7 trip to Chicago with Conn. At times, they explained, he said that he did not remember, but once he told one of the prosecutors that he had made the trip but was afraid to testify (Pet. App. A-11 to A-12). The prosecutors stated that they did not become aware of the exculpatory nature of Hageny's prior statements until they reviewed them on the night of June 2, 1980, and that they provided those statements to the defense the following day. When Hageny testified before the grand jury in July 1979, the government did not know Conn's version of the March trip to Chicago and, accordingly, did not recognize the significance of Hageny's statements (*id.* at A-11, A-17 to A-18).

The district court found that "the Government's errors were neither the product of a scheme intentionally calculated to trigger the declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict nor motivated by bad faith or undertaken to harass or prejudice defendants by successive prosecutions" (Pet. App. A-12). Furthermore, the district court implicitly found that the prosecutors had not engaged in intentional misconduct of any sort. With respect to their failure to produce Hageny's statements at an earlier point, the court wrote: "*[T]his court cannot conclude that the Government was aware* of the *Brady* character of the documents prior to

the time that it said it was" (emphasis added) (*id.* at A-11). With respect to the prosecutors' failure to notify the defense at an earlier time that Hageny was a potentially favorable defense witness, the court stated: "*The Government's error was that it failed to recognize* that Michael Hageny could persist in his position that he did not remember and that this persistence would make him a favorable witness for the defense" (emphasis added) (*id.* at A-12).

ARGUMENT

Petitioners contend (Pet. 6-9) that the Double Jeopardy Clause precludes their retrial. However, the decision of the court of appeals permitting retrial is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is unwarranted.

This Court has repeatedly stated that reprosecution is permitted under circumstances such as those presented here. Just last Term, in *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980), the Court wrote that "reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request." See also, *e.g.*, *United States* v. *Scott*, 437 U.S. 82, 93 (1978); *Arizona* v. *Washington*, 434 U.S. 497, 508 (1978); *Lee* v. *United States*, 432 U.S. 23, 30, 33 (1977); *United States* v. *Dinitz*, 424 U.S. 600, 611 (1976).

While the courts of appeals have differed to some degree in decisions concerning the effect of the Double Jeopardy Clause following a mistrial granted at the request of the defense, none has barred reprosecution where, as here, a

mistrial was declared based upon unintentional prosecutorial errors[2] rather than conduct stemming from bad faith.[3]

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[2]In our view, the declaration of a mistrial in this case was not justified. The district court held that the government had violated the rule of *Brady* v. *Maryland, supra*, by failing to disclose exculpatory information to the defense at an earlier point in the proceedings, but this Court has never specified when prior to the conclusion of trial *Brady* material must be revealed. Indeed, in *United States* v. *Agurs*, 427 U.S. 97, 103 (1976), the Court wrote that *Brady* "involves the discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense" (emphasis added). Assuming that the government must turn over *Brady* material in time for the defense to make effective use of it at trial, the disclosure in this case did not occur so late that a mistrial had to be declared. Michael Hageny's statements, which contradicted some of Conn's testimony for the prosecution, were furnished to the defense before the government rested, and therefore the defense had ample time to interview him and to call him as a defense witness if they chose. The disclosure did occur just after Conn had finished testifying, but the trial judge could have simply permitted the defense to reopen cross-examination of Conn at that time or at a later point. And if the defense required additional time to make full use of the information supplied by the government, a short continuance could have been granted. The drastic measure of declaring a mistrial was clearly unnecessary.

[3]In addition to the Seventh Circuit, four others have handed down decisions in recent years adhering to the rule barring reprosecution after a successful defense mistrial motion only if the motion was deliberately provoked by the prosecutor or judge. *United States* v. *Leppo*, 641 F. 2d 149, 152 (3d Cir. 1981); *United States* v. *Roberts*, 640 F. 2d 225, 228 (9th Cir.), cert. denied, No. 80-6557 (June 15, 1981); *United States* v. *Rios*, 637 F. 2d 728, 729-730 (10th Cir. 1980), cert. denied, 452 U.S. 918 (1981); *United States* v. *Green*, 636 F. 2d 925 (4th Cir. 1980), cert. denied, 451 U.S. 929 (1981). The Second Circuit also follows that rule, with the qualification that retrial might be prohibited in an extreme case if the "prosecutor's overreaching is so intentional, so unfair, and so prejudicial that the sanction of barring further prosecution is warranted." *Mitchell* v. *Smith*, 633 F. 2d 1009, 1013 (2d Cir. 1980), cert. denied, 449 U.S. 1088 (1981). The First Circuit, in rejecting a double jeopardy claim, has stated that where the defendant presses for a mistrial, retrial is forbidden "only if it can be said that the government's claimed error stemmed from bad faith, an effort to harass or prejudice,

Disposition of this petition should not be delayed pending the decision of this Court in *Oregon* v. *Kennedy*, cert. granted, No. 80-1991 (Oct. 13, 1981). There, a mistrial was declared at the defendant's request based upon a comment made by the prosecutor. The decision of the Oregon Court of Appeals barred retrial even though the trial-level court had found that there had been no prosecutorial "gross negligence," "intentional misconduct," or "bad faith" (Mar. 17, 1980 Tr. 22-23).[4] The appellate court termed the

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or an attempt to provoke a mistrial." *United States* v. *Zozlio*, 617 F. 2d 314, 315 (1st Cir. 1980). Clearly, none of these circuits would preclude retrial under the circumstances of the present case.

In *United States* v. *Kessler*, 530 F. 2d 1246, 1257 (1976), the Fifth Circuit barred retrial following a mistrial declared on defendant's motion and based upon "intentional misconduct" by the government. Here, there was no intentional prosecutorial misconduct. The Fifth Circuit also stated in *Kessler* that prosecutorial "gross negligence" would justify the same result (*United States* v. *Kessler*, *supra*, 530 F. 2d at 1256), but it has subsequently questioned *Kessler's* continued validity (*United States* v. *Opager*, 616 F. 2d 231, 236 n.13 (5th Cir. 1980)). Its most recent decisions appear to require proof of prosecutorial "bad faith." See, *e.g.*, *Baker* v. *Metcalfe*, 633 F. 2d 1198, 1201 (5th Cir.), cert. denied, 451 U.S. 974 (1981); *United States* v. *Davis*, 589 F. 2d 904, 906 (5th Cir.), cert. denied, 441 U.S. 950 (1979); *United States* v. *Crouch*, 566 F. 2d 1311, 1317 (5th Cir. 1978). In this case, the district court found that the prosecutors did not act in bad faith (Pet. App. A-12).

The Eighth Circuit precluded reprosecution in *United States* v. *Martin*, 561 F. 2d 135, 140 (1977), based upon "prosecutorial error undertaken to harass or prejudice the defendant." Because the district court in this case implicitly found no intentional prosecutorial misconduct (see Pet. App. A-11 to A-12), this case is distinguishable from *Martin*. In *Martin*, the Eighth Circuit stated that "prosecutorial overreaching," defined only as something more than "mere negligence" (561 F. 2d at 139), provides grounds for precluding retrial. The Sixth Circuit took a similar position in dictum in *United States* v. *Enoch*, 650 F. 2d 115, 117 (1981). Here, there is nothing to indicate that anything other than "mere negligence" was involved.

[4]We are serving petitioners with a copy of this transcript, which contains the lower court's decision.

prosecutor's statement "flagrant overreaching" and "intentional, at least in the sense that it appears it was made deliberately and after some thought * * *" (*State* v. *Kennedy*, 49 Or. App. 415, 619 P.2d 948, 950 (1980)). No federal court of appeals has gone as far as the Oregon Court of Appeals did in that case (see note 3, *supra*).

Delaying disposition of this petition—and thereby further postponing petitioners' retrial—is not justified simply because this Court granted certiorari to review the aberrant decision of the Oregon Court of Appeals in *Oregon* v. *Kennedy*. If every petition like the present one were held until *Oregon* v. *Kennedy* is decided, then every criminal defendant who sought and obtained a mistrial based upon anything done or said by the prosecutor or the court could avoid retrial for months. In some cases, such delay might appreciably weaken the prosecution's case.

If the present petition is denied before *Oregon* v. *Kennedy* is decided and the decision in that case casts doubt upon the court of appeals' decision here, petitioners may raise their double jeopardy claims in the district court or the court of appeals at that time. Moreover, no matter what this Court decides in *Oregon* v. *Kennedy*, it seems highly unlikely that reprosecution of petitioners could be barred on double jeopardy grounds under the facts found by the district court. The district court did not even find that the prosecutors in this case were guilty of "gross negligence"—the lowest standard ever suggested by a federal court of appeals as a basis for barring retrial following a successful defense mistrial motion (see note 3, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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